

ZONAL CORP.

IBLA 96-75 Decided August 21, 1998

Appeal from a Decision of the Nevada State Office, Bureau of Land Management, denying reinstatement of geothermal lease N-52964.

Reversed.

1. Geothermal Leases: Reinstatement

A BLM decision denying a petition for reinstatement of a geothermal lease on the grounds that payment of annual rental was rendered untimely because the check submitted for payment was dishonored will be reversed where the lessee establishes on appeal that the check was improperly dishonored by its bank through no fault of the lessee's. In such circumstances, the failure to pay timely was justifiable, insofar as the payment check was subsequently dishonored, and BLM's decision denying a petition for reinstatement of the lease is properly reversed.

2. Geothermal Leases: Reinstatement

Where the rental payment for a geothermal lease does not arrive at MMS on or before the anniversary date of the lease; where the record contains uncontroverted evidence that the rental payment was sent 4 days before the due date; and where the envelope bearing the postmark date of the rental payment is not in the case file, BLM's conclusion that the rental payment was not mailed far enough in advance to constitute "reasonable diligence" under 43 C.F.R. § 3244.2-2(b)(1) is properly reversed.

APPEARANCES: Mark K. Brown, Esq., Los Angeles, California, for Appellant Zonal Corporation; John Frankovich, Esq., and Miranda Du, Esq., Reno, Nevada, for Intervenor St. James Village, Inc.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Zonal Corporation (Zonal) appeals from the October 4, 1995, Decision of the Nevada State Office, Bureau of Land Management (BLM), denying reinstatement of geothermal lease N-52964, which terminated by operation of law on the lease anniversary date, August 1, 1995, for nonpayment of the annual rental. St. James Village, Inc., has petitioned to intervene on the basis that it owns a portion of the property covered by the lease. That request is granted.

The lease was issued effective August 1, 1991. According to the case record, the annual rental payment for the lease was received by the Minerals Management Service (MMS) on August 2, 1995. However, the check, when processed, was returned to MMS as uncollectible with the notation that the account on which it was drawn was closed. Zonal submitted a replacement check on August 25 and petitioned BLM for reinstatement of the lease on August 31, 1995. ^{1/}

In its petition, Zonal explained that it was purely a clerical error which caused the wrong checkbook to be used. It argued that it had been reasonably diligent in tendering payment in a timely manner and argued that this kind of mistake should not result in loss of the lease. BLM rejected this argument and further noted that, even if the check had not been dishonored, Zonal's rental was not timely filed, having been received by MMS on August 2, 1995, after the anniversary date of the lease. Zonal appealed.

In its Statement of Reasons, Zonal argues that BLM incorrectly concluded that the failure to timely pay was not justifiable and that failure was due to a lack of reasonable diligence. With respect to the check being dishonored, Zonal presented for the first time the affidavit of Christopher Gillams, a vice president of the bank on which the rental check was drawn. Gillams explains therein that it was the bank's error which caused the check to be dishonored and exonerates Zonal of any fault. As to BLM's secondary holding that the rental payment was not timely, Zonal asserts that the payment was sent 4 days before the due date (Affidavit of Mark Brown at 2), sufficiently in advance of the due date to constitute "reasonable diligence." Zonal also argues that, as a matter of public policy, development of this geothermal lease should not be discouraged in this manner.

St. James Village asks the Board to affirm denial of the reinstatement request. It points to the fact that the lease terminated automatically when rental payment was not submitted timely regardless of whether the wrong checkbook had been used or the bank had made a clerical error.

^{1/} It does not appear that a separate decision noting that the lease had terminated was issued.

St. James Village also argues that the authority to reinstate the lease is discretionary with BLM and notes that BLM, within the exercise of this discretion, concluded Zonal failed to show to BLM's satisfaction that the late payment was justifiable and not due to its lack of reasonable diligence. Finally, St. James Village maintains that it is not in the public interest to reinstate this lease.

[1] Section 5(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1004(c) (1994), provides that a geothermal resources lease, where there is no well capable of producing geothermal resources in commercial quantities, shall terminate by operation of law for "failure to pay rental on or before the anniversary date." Termination occurred here when rental was not timely filed with MMS. However, the statute also provides that a geothermal resources lease may be reinstated where "it is shown to the satisfaction of the Secretary of the Interior that the failure to pay timely the lease rental was justifiable or not due to a lack of reasonable diligence." 30 U.S.C. § 1004(c) (1994); see 43 C.F.R. § 3244.2-2(b).

A failure to make timely payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. Zonal has cited circumstances beyond its control directly leading to the dishonoring of the check, viz., the failure of bank personnel to act according to an arrangement directing how to handle checks drawn on its account. The Affidavit of Christopher Gillams, Vice President of the bank on which the check was drawn, states:

[E]arlier this year the Bank mistakenly closed one of the two Zonal accounts and transferred its balance to the other account. Mr. Brown [(Zonal's representative)] was notified of the Closing only by way of the monthly statement for the closed account which showed the closing transfer and a zero balance. He immediately asked me what had happened, and why, and I determined that the error was nothing more than a clerical error, not involving me or any other officer.

[M]r. Brown requested that the account be re-opened and its previous balance returned. I assured him that, while I was working on clearing up the situation, there would be no problem if any checks were presented against the closed account. In other words, while the correction was being made, we would pay any check from funds in the other account. * * *

[M]r. Brown specifically asked that a Zonal check payable to the Department of the Interior * * * be honored without incident, because he was concerned that he could lose valuable rights if the check were dishonored for any reason. I again assured him there would be no problem. Somehow, and without my knowledge, the check was later returned to the Department—unpaid by the Bank. I still do not know how it happened. At all times,

Zonal had sufficient funds on deposit at the Bank to have paid the check, and the check would have cleared but for the Bank's error. That check was the only Zonal check processed by the Bank without being paid.

This statement, which is fully corroborated by that of Mark Brown (Zonal's representative), is adequate to establish that the dishonoring of the rental check resulted from circumstances beyond Zonal's control. He has thus shown that the dishonoring of the check was justifiable within the meaning of the statute.

[2] It remains to determine whether, regardless of the fact that the rental check was subsequently dishonored by the bank, the circumstances surrounding the payment's untimely filing with MMS on August 2, 1995, (after the anniversary date) meet statutory and regulatory requirements establishing "reasonable diligence" in attempting to make the payment timely.

"Reasonable diligence" is defined at 43 C.F.R. § 3244.2-2(b)(2) to normally require "sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment." However, 43 C.F.R. § 3244.2-2(b)(1) specifically states that "reasonable diligence shall include a rental payment that is postmarked by the U.S. Postal Service, common carrier, or their equivalent (not including private postal meters) on or before the lease anniversary date."

Zonal asserts that the payment was sent "via United States Mail * * * at least four days before the due date believing in good faith that it would arrive in a timely manner." (Declaration of Mark Brown at 2.) Unfortunately, the envelope in which Zonal's payment was sent to MMS is not in the case file. Without this envelope or a photocopy of it, there is no evidence showing that payment did not meet the requirements for "reasonable diligence" under 43 C.F.R. § 3244.2-2(b)(1).

The record indicates that a copy of the tendered check was sent from MMS to BLM under a cover memorandum stating: "A copy of the check and the original envelope are attached." However, that original envelope (or a legible photocopy) has not been provided to us. It is well established that BLM is required to transmit to the Board the complete, original record. Michael E. Burns, 139 IBLA 7, 8 (1997); Great Western Onshore, Inc., 133 IBLA 386, 396 (1995); BLM Manual 1841.15A, Release 1-1571, Dec. 4, 1989. In the absence of the original envelope (or legible photocopy), there is no basis to disprove Zonal's assertion that payment was mailed via U.S. mail 4 days prior to the due date, or to establish that the payment was not postmarked by the United States Postal Service (USPS) on or before the lease anniversary date. In these circumstances, we conclude that Zonal has established "reasonable diligence" under the regulations.

Although the envelope may exist, it is most unlikely that it would alter our holding, as it is very likely that the envelope bore a postmark that established reasonable diligence under 43 C.F.R. § 3244.2-2(b)(1). MMS received payment on August 2, 1995. Thus, even presuming overnight delivery via USPS, the payment had to be postmarked no later than August 1, 1995, which would qualify as reasonable diligence under 43 C.F.R. § 3244.2-2(b)(1). ^{2/} Accordingly, there is no need to remand the matter to BLM for further review. Rather, BLM's Decision denying Zonal's petition for reinstatement is properly reversed on this ground as well.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed.

David L. Hughes
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

^{2/} If delivery of the letter via USPS from Zonal to MMS took more than 1 day, the envelope must have been postmarked prior to Aug. 1, 1995.

It is possible that Zonal's rental payment was hand-delivered to MMS on Aug. 2, 1995, in which case Zonal would not prevail. However, that is inconsistent with Mark Brown's affidavit and appears unlikely, as Zonal is located in Los Angeles, California, and MMS in Denver, Colorado.

